

## **Before the Complaints Assessment Committee**

**Complaint No: C26010**

In the matter of                    **Part 4 of the Real Estate Agents Act 2008**

Licensee 1:                        **Paul Neilan (20048688)**

Licensee 2:                        **Licensee 2 (XXXXXXXXX)**

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Decision to take no further action in the matter of Licensee 2  
and

Decision finding unsatisfactory conduct in the matter of Paul Neilan

8 March 2019

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### **Members of Complaints Assessment Committee: CAC519**

**Chairperson:**                    **Jane Ross**

**Deputy Chairperson:**        **Sarah Eyre**

**Panel Member:**                **Maria McElwee**

## Complaints Assessment Committee

### 1. The Complaint

- 1.1. On 24 May 2018 the Real Estate Agents Authority (the Authority) received a complaint against Paul Neilan (Licensee 1) and Licensee 2 from Complainant 1 and Complainant 2 (the Complainants).
- 1.2. Licensee 1 is a licensed Salesperson under the Real Estate Agents Act 2008 (the Act) and, at the time of the conduct, was engaged by Vining Realty Group Limited t/a Bayleys Nelson (the Agency).
- 1.3. Licensee 2 is a licensed Agent under the Act and, at the time of the conduct, was engaged by the Agency.
- 1.4. The complaint relates to a residential property (the Property).
- 1.5. The details of the complaint are that Licensee 1 disclosed a price range for the Property in a deadline sale, didn't ensure that presented offers were completed and recorded accurately, and that Licensees 1 and 2 didn't act as they said they would in a multi-offer situation and failed to communicate properly with the Complainants.
- 1.6. In particular, the Complainants advised that
  - a) They entered into an agency agreement with Licensee 1 for a deadline treaty sale with their expectations being for a sale price of \$1.2 million. They were advised that the figures mentioned for the website were the range that people search within, not a selling price. They did not give Licensee 1 instructions to discuss or disclose price ranges with potential buyers or to anyone.
  - b) Four days before the deadline sale closing date, Licensee 1 disclosed to a buyer's representative that the Property would be sold between \$1.1 and \$1.2 million. Licensee 1 also indicated to other buyers that \$1.1 million would be an acceptable sale price when they had made it clear it would not be.
  - c) Complainant 1 complained directly to Licensee 2 about Licensee 1 "capping" the Property with his price disclosure, and also expressed his concern about subsequent offers. Licensee 2 agreed Licensee 1 had made an error in disclosing a price cap for the Property and advised he was overseeing everything and that he attends all offers being presented.
  - d) Prior to the deadline sale close Licensee 1 told them he was going away on a surprise trip and the deadline sale close needed to be postponed. They were not asked if they agreed to the postponement.
  - e) Three offers were presented by Licensee 1 at the rescheduled deadline sale close on 11 April 2018 but no offers were acceptable to them and one offer was not signed. Licensee 2 did not attend the offer presentation as he had promised he would and they had no further contact from him.
  - f) After the offer presentation, Licensee 1 rang Complainant 2 and advised verbally that one offer was increased from \$1.1 million to \$1.25 million but that change was not put in writing to them.

- g) Two further offers were presented on 24 April 2018 but neither was acceptable to them. They received little or no feedback relating to offers until they complained.
  - h) Licensee 1 advised that a prospective purchaser who had offered at both the deadline sale and the subsequent multi-offer had put a third offer in writing to Licensee 1 but that he could not present that offer to them until instructed by the prospective purchaser. Licensee 1 told them that after three days he was advised by the prospective purchaser that he was not going to proceed and the offer was not presented to them. They have never seen that offer.
  - i) They requested to withdraw the Property from the Agency but had no response. They paid money for a deadline treaty marketing strategy which was sabotaged by Licensee 1 capping the price, they wasted ten weeks of prime marketing time, Complainant 2 delayed an overseas trip to work through the sale and the entire experience was stressful.
- 1.7. The Complainant requested a remedy, being that marketing costs are refunded by the Agency and that the Licensees apologise.
- 1.8. Licensees 1 and 2 responded to the complaint against them.

### **Response: Licensee 1**

- 1.9. Licensee 1 responded to the complaint against him. In particular, Licensee 1 commented that:
- a) He met the Complainants at the Property on 7 March 2018 and returned to present an appraisal and marketing proposal to them on 12 March 2018. His appraisal was accurate, the properties identified as comparable were very well suited and this was proved by buyer feedback and the price the Property was subsequently listed with through another agency.
  - b) The Complainants agreed to a deadline sale and a three week marketing campaign. The appraisal document was signed with an appraised value of \$1million to \$1.1million and he and the Complainants completed and signed the agency agreement and marketing plan. The Complainants agreed that he could disclose a website search range of \$900,000 to \$1.2 million.
  - c) Complainant 1 advised his father had passed away, that he needed to travel to the UK, and that Licensee 1 should not contact him but should deal directly with Complainant 2. Complainant 2 verbally requested that he come to the Property on the Monday following an open home to go over attendee feedback.
  - d) During the three weeks of marketing he held three open homes and private viewings with a call to Complainant 2 after each open home and inspection. Following each open home he met with Complainant 2 at the Property to advise of interest and feedback. As instructed he did not contact Complainant 1 during the marketing period.
  - e) At the end of the deadline sale he had three offers from his own prospective purchasers and a fourth prospective purchaser through another licensee who asked that the deadline be extended for 24 hours so that they could make an offer. The Complainants agreed to the extension but that prospective purchaser failed to make an offer.
  - f) He presented the three offers to Complainant 2 and emailed copies of the offers to Complainant 1. None of the offers were accepted.

- g) Complainant 1 says one of the presented offers was not signed but it was, although there were no initials on the front page of that offer which is often the case on an initial offer where no changes have been made.
- h) Marketing continued with further offers received from two parties who had offered at the deadline sale. The two offers were presented as a multi-offer (following procedures as set out by the Real Estate Institute of New Zealand (REINZ)), in person to Complainant 2 and by email to Complainant 1. Complainant 1 told him that if he could get one of the offers up \$15,000 (from \$1.150 million to \$1.165 million) then there would be a deal but Complainant 1 would not make a written counter offer. Both offers were declined.
- i) One of the prospective purchasers from the deadline sale and the multi-offer was heading back to the United States (US) and asked Licensee 1 to prepare a third offer for him on the basis it was easier to prepare and leave it than to direct an offer from the US. Licensee 1 was directed not to proceed with presenting the offer unless instructed by that prospective purchaser. He informed the Complainants of the situation but was subsequently advised by the prospective purchaser not to proceed so did not present the offer to the Complainants.
- j) Throughout the marketing campaign Complainant 1 verbally indicated that an offer of \$1.2 million would be accepted. He did advise a price range to a BBC TV representative who was price ranging the Property for an upcoming property program, but he does not consider his advice in that respect contradicted Complainant 1's verbal and written instructions to him.
- k) He had daily calls and texts with Complainant 2 throughout the marketing campaign and provides copies of correspondence and phone/text records. A response was also made within 24 hours of receiving any request or a complaint from the Complainants.

## **Response: Licensee 2**

- 1.10. Licensee 2 responded to the complaint against him. In particular, Licensee 2 commented that:
- a) The mistake that Licensee 1 made in respect of disclosing a price range for the Property to the BBC representative was in not getting Complainant 1 to agree to that disclosure.
  - b) In respect of the Complainants' allegation that one of the offers presented at the deadline sale was unsigned, the offer in question was not signed on the front page but was signed and it was "...our decision..." to present the offer to Complainant 1 in the format it had been received by email from the prospective purchaser.
  - c) He was due to attend the presentation meeting on the scheduled deadline date but it was postponed due to the interest of another licensee's prospective purchaser. It was decided that the offers would be emailed directly to Complainant 1 instead.
  - d) When the other licensee's prospective purchaser pulled out, it was agreed that Licensee 1 would present the offers to Complainant 2 the following morning as all three offers were from prospective purchasers introduced by Licensee 1. He was not invited to that meeting and did not need to attend under the Agency's multi-offer policy.
  - e) He agrees there was a discussion with Complainant 1 in respect of a \$15,000 increase to a presented offer, but also considers this was at the multi-offer stage and not at the deadline sale stage and that it was Complainant 1 who verbally requested the increase.

- f) The third offer made by one of the prospective purchasers was given to Licensee 1 on the proviso that it was not to be presented until the prospective purchaser got back to the US and checked with his wife. He attaches an email from that prospective purchaser with instructions not to proceed with that offer.

## **2. What we decided**

- 2.1. On 19 September 2018 the Complaints Assessment Committee (the Committee) considered the complaint and decided to inquire into it under section 79(2)(e) of the Act.
- 2.2. On 30 January 2019 the Committee held a hearing on the papers and considered all the information that had been gathered during the inquiry.

### **Licensee 1**

- 2.3. The Committee found the Licensee has engaged in unsatisfactory conduct under section 89(2)(b) of the Act. The decision was also made with reference to the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 - Rules 5.1, 6.1, 6.2, 9.1, 9.3, 10.2, and 10.10.

### **Licensee 2**

- 2.4. The Committee decided to take no further action on this complaint against Licensee 2.
- 2.5. This decision was made under section 89(2)(c) of the Act. The decision was also made with reference to the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 – Rule 9.1, 9.3 and Section 50 of the Act.

## **3. Our reasons for the decision**

- 3.1. On the complaint against **Licensee 1**, the Committee found, pursuant to section 72 of the Act, that the conduct of the Licensee falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee and contravenes rules made under the Act.

### **Did Licensee 1 fail to act in good faith and in accordance with his fiduciary duty to his client with regard to the Complainants' price expectations?**

- 3.2. Rule 6.1 requires that a licensee comply with fiduciary obligations to the licensee's clients
- 3.3. Rule 6.2 requires a licensee to act in good faith and to deal fairly with all parties engaged in a transaction.
- 3.4. Rule 9.1 requires a licensee to act in the best interests of a client and to act in accordance with the client's instructions unless to do so would be contrary to law.
- 3.5. The appraisal for the Property states an appraised price of \$1.1 million and the agency agreement for the Property does not state a price but has a website search price range of \$900,000 to \$1.2 million.
- 3.6. The Complainants' understanding in agreeing to a deadline sale marketing strategy was that no price range or top figure is stated and that competitive bidding can push the price to higher ranges. They understood that the web site search range agreed to did not limit a sale

price and would not be disclosed.

- 3.7. The Complainants say they set their expectations for the Property at \$1.2 million and above and were very clear about not accepting anywhere near \$1.1 million.
- 3.8. Licensee 1 did give a sale range of \$1.1 million to \$1.2 million to a buyer's agent which implied that the Complainants would accept a sale of \$1.1 million when that clearly was not the case, and it capped the sale price. Licensee 2 says Licensee 1 made a mistake in quoting a lowest and highest figure but did so in response to the buyer's agent's request for a "rough ballpark" lowest to highest price. Licensee 1 admits he answered the request incorrectly but says his advice was not contradictory to what Complainant 1 had indicated verbally and in writing, and it was not how he represented the Property to all other parties. Licensee 2 advises that Licensee 1 quoted the Property to sales staff in excess of \$1.2 million.
- 3.9. Notwithstanding the fact the appraisal and the agency agreement the Complainants signed indicated a price range for the Property between \$1 million to \$1.2 million, and regardless of the Complainants' price expectations, the agreed marketing strategy was for a deadline sale. The Complainants chose deadline sale as a means of sale without price disclosure and where no upper limit is set.
- 3.10. Licensee 1 did not have the Complainants' permission to disclose a price or price range to any buyer prior to the deadline sale and Licensee 1's conduct in making a price disclosure was not in his clients' best interest and potentially jeopardised the result of the deadline sale. This was also a breach of good faith and a breach of his fiduciary duty to his client.
- 3.11. The Committee finds Licensee 1 breached Rules 6.1, 6.2 and 9.1 which is unsatisfactory conduct.

#### **Was the appraisal prepared in accordance with Rule 10.2?**

- 3.12. Rule 10.2 requires that an appraisal of land must be provided in writing to a client by a licensee, that it must realistically reflect current market conditions and must be supported by comparable information on sales of similar land in similar locations. The Rule does not specify what format the appraisal is required to take and this is left to the discretion of the licensee.
- 3.13. Licensee 1's appraisal states a price range for the Property of \$1.0 million to \$1.1 million and an appraised price of \$1.1 million. The agency agreement has no fixed price.
- 3.14. The Committee has considered the copy of Licensee 1's appraisal for the Property provided in evidence and finds it does satisfy the requirements of 10.2 and is substantiated by buyer feedback and the offers received for the Property.
- 3.15. The fact the Complainant vendors had price expectations above the appraised value does not affect the validity of Licensee 1's appraisal and it is always a vendor's right to state what price they will accept for a property, regardless of an appraised value.
- 3.16. The Committee finds Licensee 1's appraisal to be in compliance with Rule 10.2 and it takes no further action in this respect.

#### **Did Licensee 1 fail to act in the best interests of his client by not presenting a signed offer he was holding and/or not ensuring all offers were accurately recorded in writing?**

- 3.17. **Not presenting an offer:**

- 3.18. Rule 10.10 requires that a licensee must submit to the client all offers concerning the grant, sale, or other disposal of any land, provided that such offers are in writing.
- 3.19. A prospective purchaser who had offered at the deadline sale, and who had been a party to the multi-offer, expressed to Licensee 1 an interest in making a further offer for the Property but on the basis that he needed to discuss the matter first with his wife. The offer was put in writing and left with Licensee 1 for convenience as the prospective purchaser was travelling out of the country. Licensee 1 was instructed that the offer was not to be presented to the Complainants until advised by the prospective purchaser.
- 3.20. Licensee 1 advised the Complainants that he had received an offer and verbally stated the price, but also explained why he could not present the offer at that time. Evidence shows that Licensee 1 subsequently received an email from the prospective purchaser advising that the offer was not to be presented.
- 3.21. Complainant 1 considered that the offer should have been presented when received by Licensee 1 and that by delaying the presentation Licensee 1 risked the offer falling through and other potential offers being affected by it.
- 3.22. Licensee 1 had a duty to keep the Complainants informed of matters relevant to their interests and accordingly did advise the Complainants when he received what is referred to as an offer, in writing. However, it was made clear to Licensee 1 that he was instructed to hold the offer until further advised. The offer that Licensee 1 held was not a complete and finalised offer but a potential offer; it could not be presented and considered as an offer until Licensee 1 was instructed by the prospective purchaser to present it, which he was not.
- 3.23. Whilst it would have been disappointing for the Complainants to know that a potential offer at an acceptable level would not be made, Licensee 1 could not present that offer to the Complainants without the authority of the party making the offer, and he did not receive that authority.
- 3.24. Licensee 1 did not fail to act in the Complainants' best interests and was not in breach of Rule 10.1 in this respect.
- 3.25. **Not ensuring all offers were accurately recorded:**
- 3.26. Rule 5.1 requires that a licensee exercise skill, care, competence and diligence at all times when carrying out real estate agency work.
- 3.27. The Complainants say that one of the offers presented to them at the deadline sale close was unsigned and had no initials on the clauses.
- 3.28. Licensee 1 says the offer was signed but the front page was not initialed which is not unusual when an offer is first presented and no changes have been made.
- 3.29. Licensee 2 states that the offer in question was received from a prospective purchaser by email and a decision was made to present it to the Complainants as it was received.
- 3.30. Evidence shows that one of the offers presented at the deadline sale was signed in the body of the contract but the appendix and clauses were not separately initialed. Although best practice would be for a licensee to have a prospective purchaser initial clauses it is a convention rather than a rule to do so. There is no specific requirement to have all pages and/or clauses of an ASP initialed and the fact of the entire offer having been sent as one email would indicate the prospective purchaser's acceptance as a whole of the ASP document as received.

- 3.31. The Committee considers there was no requirement that the offer was initialed on all clauses and pages and finds that Licensee 1 did not fail to ensure an offer was signed prior to presentation.
- 3.32. The Complainants say that a price increase of \$15,000 was made to one offer by a prospective purchaser shortly after presentation of the deadline sale offers, which would have increased that offer from \$1.1 million to \$1.25 million (an increase of \$150,000). They say that price increase was not put in writing to them and was only advised verbally.
- 3.33. Licensee 1 and Licensee 2 refer to a discussion in respect of a \$15,000 increase to an offer but recall that discussion in reference to the multi-offer and say the increase was asked for by the Complainants, not by a prospective purchaser.
- 3.34. A party to the Deadline sale, who also offered at the multi-offer, says they may have discussed a price increase when their first offer at \$1.1 million was declined but that their top offer was \$1.15 million which they made at the multi-offer presentation. A copy of that offer is provided in evidence. Evidence also indicates that the Complainants did make a counter offer to that party of \$1.165 million (an increase of \$15,000) after the multi-offer but that counter offer was not accepted.
- 3.35. There is no independent or documentary evidence to support the Complainants' reference to an increased offer of \$1.25 million, so the Committee cannot accept this evidence.
- 3.36. The Complainants declined all the offers made at the deadline sale saying they would not accept anywhere near \$1.1 million. In an email sent by Complainant 1 to Licensee 1 on the day of the deadline sale close, Complainant 1 says *"The offer for \$1.10MM which [Complainant 2] tells me you have rang and said verbally it is now \$1.125??? this is also unacceptable along with the length of settlement etc."*
- 3.37. Licensee 1 advised the Complainants verbally that a party wished to increase their offer rather than putting that increase in writing as the Complainants had already made it clear that an offer at that level was not acceptable. Licensee 1 did still have an obligation to advise the Complainants of the price increase but, as they had already indicated, they declined the price increase and accordingly Licensee 1 was not required to, and did not, obtain that increased offer in writing.
- 3.38. The Committee finds Licensee 1 did not fail to act in his clients' best interests and did not fail to exercise skill, care and competence in relation to the offers presented to the Complainants.

**Did Licensees 1 and 2 act in the best interests of the Complainants with regard to the multi-offer?**

- 3.39. With reference to Rule 9.1 as above.
- 3.40. Section 50 of the Act requires that a licensee must, in carrying out any agency work, be properly supervised and managed by an agent or a branch manager to ensure that the licensee's work is performed competently and in compliance with the Act.
- 3.41. Complainant 1 says that Licensee 1 received two offers for the Property on 23 April 2018, two weeks after the deadline sale close, but that Licensee 1 then went on a break and the offers were not received by them until 26 April 2018, by email.
- 3.42. Complainant 1 says Licensee 2 had promised to be present at, and to supervise, all offer presentations but Licensee 2 was not present at the deadline sale close or during the multi-



offer process in breach of the Agency's own supervision process. This is not disputed by the Licensees.

- 3.43. Evidence shows an email from Licensee 2 to Complainant 1 dated 8 April 2018, prior to the close of the deadline sale, stating "I always attend the offer close and the presentation of the offers in case further negotiation with any of the purchasers is necessary."
- 3.44. Licensee 1 says Licensee 2 was scheduled to attend the original deadline sale presentation. However it was anticipated that a fourth party would be making an offer through another licensee and the deadline close was delayed for a day on that party's behalf but no offer eventuated. Licensee 2 was unable to attend the rescheduled offer presentation but agreed with Licensee 1 that, as all the offers were from purchasers introduced by Licensee 1, Licensee 2 did not need to attend. Licensee 2 says the original deadline sale meeting was the only meeting he was invited to and he was not required to attend a second meeting under the Agency's multiple offer policy.
- 3.45. Licensee 1 says that the two offers received at the multi- offer on 24 April 2018 were presented to Complainant 2 in person and emailed to Complainant 1 for his response which was received on 26 April 2018.
- 3.46. The Agency's multi-offer policy document is not provided to the investigation but it is considered standard industry practice that at a multi-offer presentation where offers are from more than one licensee's buyers, an agency manager or supervisor would present all the offers to avoid any suggestion of a conflict of interest between licensees, although this is not a requirement of the Act or the Rules.
- 3.47. All offers at the deadline sale presentation and at the multi-offer presentation were from Licensee 1's buyers and there is no suggestion that there was any conflict of interest but the Committee considers it was poor business practice that Licensee 2 stated in writing that he would attend and then failed to do so without explanation. However, not every failure to comply with best practice will necessarily amount to unsatisfactory conduct and the Committee does not find Licensee 2 in breach of the Act or Rules in this respect.
- 3.48. At the time of the transactions for the Property Licensee 1 had been licensed for two years and it was not a requirement that a supervisor attend offer presentations with Licensee 1. Evidence also shows that Licensee 2 was informed of the transactions and was supervising Licensee 1 in that respect.
- 3.49. The Committee finds that Licensee 1 and Licensee 2 have not failed to act in the best interests of the Complainant client in respect of the deadline and multi-offer presentations.

**Did Licensees 1 and 2 communicate regularly and in a timely manner, keeping the Complainants informed of all matters relevant to the Complainants' interests?**

- 3.50. Rule 9.3 requires that a licensee communicate regularly and in a timely manner and keep the client informed of matters relevant to the client's interest, unless otherwise instructed by the client.
- 3.51. Complainant 1 says that communication in relation to the Property was terrible. He notes that after the Property was listed he only received emails after he complained and there were no vendor reports, nor did Licensee 1 visit the Property each week to discuss open homes and buyers as he claims he did. Complainant 1 says Complainant 2 received an "occasional text" from Licensee 1.

- 3.52. The Complainants state that they were given no opportunity to discuss complaints in person, or by phone.
- 3.53. Licensee 1 says he held three open homes at the Property prior to the deadline sale and four open homes afterwards with private viewings by appointment. Licensee 1 says he met with Complainant 2 before each viewing to gain access as he did not hold a key to the Property. He also says that after each open home he would call Complainant 2 and that the following Monday he would attend the Property to discuss interest and feedback. When there were no attendees at open homes he would advise Complainant 2 by phone and would not hold a follow up meeting. He says he considered the verbal feedback reports on Monday mornings to be his vendor reports.
- 3.54. Licensee 1 reiterates that he was instructed to deal just with Complainant 2 as Complainant 1 was overseas, that he would go through the open home registers with Complainant 2 and that she would say she would skype Complainant 1 “tonight”.
- 3.55. Licensee 1 provides his open home registers for the pre-deadline sale period with handwritten notes as to times and dates that he visited and provided feedback to Complainant 2. Licensee 1 also says his calls and texts were daily with Complainant 2 and provides phone records in evidence.
- 3.56. Licensee 2 agrees the only email contact he had with Complainant 1 was in responding to his complaints and provides copies of those email responses. The Complainants say they requested to withdraw the Property from the Agency and had no response but Licensee 2 provides a copy of an email to Complainant 1 dated 21 May 2018 which acknowledges and agrees to Complainant 1’s request, as well as advising of the investigation into the Complainants’ complaint in respect of price disclosure and offering the release of photos of the Property.
- 3.57. The agency agreement was signed for the Property on 12 March 2018 but the listing did not go live until 19 March 2018 and the first open home was held on 25 March 2018. Licensee 1’s records show emails from Licensee 1 to the Complainants from 14 March 2018 through to the end of April 2018, phone calls to Complainant 2 from 23 March 2018 through to the end of April 2018 and text messages from 3 April 2018 until the end of April 2018.
- 3.58. The Agency’s marketing material for the Property states it provides weekly reports and regular phone conversations and meetings as required. The Complainants consider there were no weekly vendor reports as none were received in writing but the Agency does not specify that the vendor reports are made in writing (or any other particular format) and Licensee 1 did make weekly verbal reports to Complainant 2 on behalf of the Complainants. Rule 9.3 also does not prescribe the means by which communication with a client is carried out.
- 3.59. The Committee considers Licensee 1 did communicate regularly and in a timely manner with the Complainant clients and kept them informed of matters relevant to them and the transactions for the Property. It also considers that Licensee 2 did respond to the Complainants’ complaints and that it is the Agency’s prerogative to respond in a manner of its choosing.
- 3.60. The Committee finds that Licensee 1 and Licensee 2 are not in breach of Rule 9.3 in respect of the transactions for the Property and takes no further action in this matter.

#### **4. Request for submissions on orders: Licensee 1**

- 4.1. The Complainant is to file submissions (if any) on what orders should be made within ten working days (by 21 March 2019) from the date of this decision. These submissions, if any, will then be provided to the Licensee, with a timeframe for filing final submissions.
- 4.2. The Committee requires the CAC Administrator to obtain a record of any previous disciplinary decision in respect of the Licensee and, if any such decision exists, provide it to the Committee.

#### **5. What happens next**

- 5.1. The Committee will consider all submissions and issue a decision on orders.

#### **6. Your right to appeal**

- 6.1. In the matter of **Licensee 1**, the Committee considers the 20 working day appeal period does not commence until it has finally determined the complaint by deciding what orders should be made, if any.
- 6.2. In the matter of **Licensee 2**, if you are affected by this decision of the Committee, the right to appeal is set out in section 111. You may appeal in writing to the Real Estate Agents Disciplinary Tribunal (the Tribunal) within 20 working days after the date notice is given of this decision.
- 6.3. Your appeal must include a copy of this decision and any other information you wish the Tribunal to consider in relation to the appeal. The Tribunal has a discretion to accept a late appeal filed within 60 working days after the date notice is given of this decision, but only if it is satisfied that exceptional circumstances prevented the appeal from being made in time.
- 6.4. For further information on filing an appeal, read **Guide to Filing an Appeal** at [Ministry of Justice-Tribunals \(www.justice.govt.nz/tribunals\)](http://www.justice.govt.nz/tribunals).

#### **7. Publication**

- 7.1. The Committee has deferred making any decision on publication until its hearing to decide what orders, if any, should be made.

Signed



Jane Ross

Date: 8 March 2019

## Appendix 1: Relevant provisions

The Real Estate Agents Act 2008 provides:

### **50 Salespersons must be supervised**

- (1) A salesperson must, in carrying out any agency work, be properly supervised and managed by an agent or a branch manager.
- (2) In this section properly supervised and managed means that the agency work is carried out under such direction and control of either a branch manager or an agent as is sufficient to ensure—
  - (a) that the work is performed competently; and
  - (b) that the work complies with the requirements of this Act.

### **89 Power of Committee to determine complaint or allegation**

- (1) A Committee may make 1 or more of the determinations described in subsection (2) after both inquiring into a complaint or allegation and conducting a hearing with regard to that complaint or allegation.
- (2) The determinations that the Committee may make are as follows:
  - (a) a determination that the complaint or allegation be considered by the Disciplinary Tribunal;
  - (b) a determination that it has been proved, on the balance of probabilities, that the licensee has engaged in unsatisfactory conduct;
  - (c) a determination that the Committee take no further action with regard to the complaint or allegation or any issue involved in the complaint or allegation.
- (3) Nothing in this section limits the power of the Committee to make, at any time, a decision under section 80 with regard to a complaint.

### **72 Unsatisfactory conduct**

For the purposes of this Act, a licensee is guilty of unsatisfactory conduct if the licensee carries out real estate agency work that—

- (a) falls short of the standard that a reasonable member of the public is entitled to expect from a reasonably competent licensee; or
- (b) contravenes a provision of this Act or of any regulations or rules made under this Act; or
- (c) is incompetent or negligent; or
- (d) would reasonably be regarded by agents of good standing as being unacceptable.

### **93 Power of Committee to make orders**

- (1) If a Committee makes a determination under section 89(2)(b), the Committee may do 1 or more of the following:
  - (a) make an order censuring or reprimanding the licensee;
  - (b) order that all or some of the terms of an agreed settlement between the licensee and the complainant are to have effect, by consent, as all or part of a final determination of the complaint;
  - (c) order that the licensee apologise to the complainant;
  - (d) order that the licensee undergo training or education;

- (e) order the licensee to reduce, cancel, or refund fees charged for work where that work is the subject of the complaint;
  - (f) order the licensee:
    - (i) to rectify, at his or her or its own expense, any error or omission; or
    - (ii) where it is not practicable to rectify the error or omission, to take steps to provide, at his or her or its own expense, relief, in whole or in part, from the consequences of the error or omission;
  - (g) order the licensee to pay to the Authority a fine not exceeding \$10,000 in the case of an individual or \$20,000 in the case of a company;
  - (h) order the licensee, or the agent for whom the person complained about works, to make his or her business available for inspection or take advice in relation to management from persons specified in the order;
  - (i) order the licensee to pay the complainant any costs or expenses incurred in respect of the inquiry, investigation, or hearing by the Committee.
- (2) An order under this section may be made on and subject to any terms and conditions that the Committee thinks fit.

111 Appeal to Tribunal against determination by Committee

- (1) A person affected by a determination of a Committee may appeal to the Disciplinary Tribunal against the determination within 20 working days after the day on which notice of the relevant decision was given under [section 81](#) or [94](#), except that no appeal may be made against a determination under [section 89\(2\)\(a\)](#) that a complaint or an allegation be considered by the Disciplinary Tribunal.
- (1A) The Disciplinary Tribunal may accept a late appeal no later than 60 working days after the day on which notice was given to the appellant if it is satisfied that exceptional circumstances prevented the appeal from being made in time.
- (2) The appeal is by way of written notice to the Tribunal of the appellant's intention to appeal, accompanied by—
  - (a) a copy of the notice given to the person under [section 81](#) or [94](#); and
  - (ab) the prescribed fee, if any; and
  - (b) any other information that the appellant wishes the Tribunal to consider in relation to the appeal.
- (3) The appeal is by way of rehearing.
- (4) After considering the appeal, the Tribunal may confirm, reverse, or modify the determination of the Committee.
- (5) If the Tribunal reverses or modifies a determination of the Committee, it may exercise any of the powers that the Committee could have exercised.

The relevant provisions from the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 are:

- 5.1 A licensee must exercise skill, care, competence, and diligence at all times when carrying out real estate agency work.
- 6.1 A licensee must comply with fiduciary obligations to the licensee's client.
- 6.2 A licensee must act in good faith and deal fairly with all parties engaged in a transaction.

- 9.1 A licensee must act in the best interests of a client and act in accordance with the client's instructions unless to do so would be contrary to law.
- 9.3 A licensee must communicate regularly and in a timely manner and keep the client well informed of matters relevant to the client's interest, unless otherwise instructed by the client.
- 10.2 An appraisal of land or a business must—
- (a) be provided in writing to a client by a licensee; and
  - (b) realistically reflect current market conditions; and
  - (c) be supported by comparable information on sales of similar land in similar locations or businesses.
- 10.10 A licensee must submit to the client all offers concerning the grant, sale, or other disposal of any land or business, provided that such offers are in writing.